No. 76-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

CHAMPION INTERNATIONAL CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Nachman, "The New Policy Provisions for General Liability Insurance," Society of Chartered Property and Casualty Underwriters (Fall 1965) 14n

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Preface

This is an insurance case. It revolves around facts, not law. The trial judge, and the Court of Appeals for the Second Circuit, held the petitioner liable for insurance coverage within the plain import of the policy language of the Umbrella Excess Third Party Liability policy issued to respondent by petitioner.

The petition for certiorari is a disservice to this Court. It distorts the record. It creates counterfeit questions for review which mock petitioner's actual contentions below, and the concrete realities of the true record. The inexorable underlying feature of the petition is that it seeks to propel this Court to contribute its own second guess in appraising the unique facts on which adjudication rested.

Petitioner lost below because of the economic and factual setting which rebuffed petitioner's gambit to make

the insurance coverage for which respondent had paid substantial premiums an empty shell. Indeed, the insurance coverage purchased by respondent contained the revised standard form of products liability insurance substituting an "occurrence" basis of coverage for the obsolete "accident" coverage. The petition completely bypasses this significant revision. Indeed, it misleads the Court in inviting belief that under the standard policies "occurrence" is but a synonym for "accident" (Petition, p. 13).

At the trial, petitioner's counsel conceded that it could not prevail with its aggressive distortion of the meaning, purpose and object of the insurance coverage unless its construction is the *only one possible* (JA 143).[1] Petitioner's position collapsed at trial where the factual framework of the controversy made it unmistakably clear to the trial judge that petitioner was playing an arcane game of semantics; the facts established that petitioner was urging a bizarre misreading of the policy provisions that, if accepted, would unabashedly have deprived respondent of coverage on the risk central to its business which it obviously intended to secure.

The Second Circuit, in affirming the trial judge, invoked the record factual demonstration of the "underlying circumstances"; i.e., "the business purposes sought to be achieved by the parties"; the plain language of the Umbrella Excess Policy "supports" the liability of Continental Casualty Company ("Continental"), and liability is singularly warranted to effect the factual business purposes (Petition's Appendix A, pp. 6a-8a). The single dissenter, District Judge Newman, also noted at the outset of his dissent that the lawsuit was hinged to the particular circumstances of this case, as indisputably established by the record (*Id.* 8a).

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[1] The letters "JA" refer to the Joint Appendix in the Court of Appeals.

On the petition for rehearing, even the dissenter voted against rehearing. Not a single active circuit judge voted for a rehearing *en banc* (Petition's Appendix C, pp. 16a-18a).

The new counsel retained by petitioner for this Court have strained mightily to de-emphasize the actual adjudications below founded on the evidence presented. Petitioner now seeks to enlist the interest of this Court by contriving fictitious, shadowy, abstract, and even internally contradictory hypothetical "Questions Presented" (Petition, p. 2).

Petitioner's first question, on the actual record is, without further characterization, an effrontery to the Second Circuit. The Second Circuit decided this case on the facts, and far from refusing to apply the laws of New York, decided the appeal in accordance with the New York law. It is truly incredible for petitioner to urge that the Second Circuit was unaware of the doctrine of *Erie R. R.* v. *Tompkins*, 304 U.S. 64 (1938), one of the most famous cases of this century.

Furthermore, petitioner thumbs its nose at its own trial posture. As the trial judge noted, petitioner itself urged that the policy language is clear and unequivocal, and should be construed by the Court according to its plain meaning (Petition, p. 23a). Because the courts below dared to reject petitioner's misconstruction of the policy, petitioner has invented a spurious question charging that the courts should not have given the policy the plain reading that petitioner itself had urged the courts to do. In a word, petitioner's first question is an amalgam of distortion and self-contradiction.

The second question invented by petitioner is spurious, and unmistakably so. First, there is no burden on interstate commerce simply because petitioner lost. Petitioner at no stage in the proceedings below ever had the temerity

to contend that its defeat on the merits would improperly burden interstate commerce. There is no confusion about the "sources of law to be applied in diversity cases" in interpreting insurance policies. Judge Moore, in his opinion for the Second Circuit panel, explicitly noted: "Both parties in the instant case are agreed that New York law governs the controversy." (Petition's Appendix A, p. 7a). Purely because Judge Moore's opinion then went on to state that respondent was entitled to prevail even without the benefit of the New York decisional law mandating that all ambiguities be resolved in favor of the insured, petitioner now presumes to depict Judge Moore as a confused judge writing for a confused panel, with even a confused dissenter, and indeed the entire Second Circuit as confused since not a single judge voted for rehearing *en banc*.

Petitioner's second question rests upon a false premise; there is absolutely no conflict in the circuits. This case was correctly decided on what petitioner itself has described as the "peculiar facts" and the "unusual circumstances" established on this record (Petition, pp. 9, 16). Petitioner's strained thesis that the decision below introduces "uncertainty" in construction of policy coverage is nullified by two independently conclusive points:

1. Parties to a contract can shape it as they like; hence, petitioner's intellectual charade envisaging a speculative and undefined burden on interstate commerce is wholly academic. Petitioner's litany of fears is resolved by simple draftsmanship, as the trial judge explicitly underscored at trial (JA 141) and in his opinion (Petition's Appendix C, p. 24a).

2. Petitioner in effect conceded below that except for the fortuitous circumstance of an endorsement providing for a deductible, petitioner itself would be interpreting the standard clauses of the insurance policy exactly as respondent urged, and exactly as the courts construed them

(JA 129).[1] In other words, the deductible simply provided a tantalizing opportunity to strain for a construction of standard provisions which petitioner itself knew to be baseless. Petitioner's confession concerning its posture also had an unintended functional utility militating against its petition for certiorari: Petitioner had acknowledged that the existing standard provisions in the insurance policies already provided a clearcut degree of predictability in defining the obligations of the insurance carrier. It ill becomes petitioner, in any event, to seek certiorari on a predicate that the insurance industry is inept at draftsmanship, and that this Court should put aside all other business and function as an expert scrivener for an inept industry.

The third question contrived by petitioner is, without further characterization, semantic nonsense studded with internal contradictions and cloudy abstractions trailing off into a void of uncertainty and confusion. There are no less than seven independently decisive deficiencies in petitioner's final stab at certiorari:

1. Petitioner is flitting back and forth contriving one artifice after another, heedless of internal inconsistency. In its first question, petitioner invents the non-existent thesis that the Court of Appeals failed to follow New York state law. In the third question petitioner postulates that the Court of Appeals should have refused to follow New York state law. This web of confusion is left unravelled in the petition.

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[1] Even in the Petition Continental has in effect acknowledged that its construction of the standard provisions is at war with the construction it would "normally" advance. The presence of a deductible triggered an abnormal contention by Continental tailored to frustrate Champion from receiving even one cent of indemnification for its loss of more than $1,600,000 despite a Comprehensive General Liability policy and petitioner's Umbrella Excess Liability policy (Petition, p. 8).

2. Petitioner invites the Court to "expound" (Petition, p. 17) upon a repeal of the *Erie* doctrine, where no such repeal was urged below, and where there is absolutely no record whatsoever that even remotely serves as a framework for considering such a drastic reversal of such a basic constitutional doctrine.

3. Petitioner's unfocused attack upon the *Erie* doctrine is rebuffed by this Court's unanimous decision in *Ruhlin* v. *New York L. Ins. Co.*, 304 U.S. 202 (1938), decided just seven days after *Erie*. *Ruhlin* also involved a dispute concerning the interpretation of standard clauses in an insurance policy, and Continental's petition collides with this Court's firm ruling:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.
>
> • • •
>
> "Application of the 'State law' to the present case, or any other controversy controlled by Erie R. Co. v. Tompkins, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. • • •" (304 U.S. at 206, 208-9).

4. In Point I of its brief to the Court of Appeals (p. 22), petitioner stated: "Champion [respondent] has contended, and Continental has not disputed, that New York law applies to the construction of the instant policies. We believe, however, that the New York law is not in conflict with the holdings of any other jurisdiction." In this Court petitioner now invents the very conflict which it had disavowed below.

5. The Court of Appeals based its decision on a factual analysis of the "business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes" (Petition's Appendix A, p. 6a). This case therefore involves merely factual issues of importance only to the litigants; certiorari is inappropriate to review evidence and to discuss specific facts.

6. The evanescent "burden on interstate commerce" contrived by petitioner is a phantom question. The petition makes no effort to explain how this mysterious burden could be eliminated, or even to define the nature of the burden. The burden apparently arises because petitioner lost below; the burden magically disappears if on the facts the courts below had chosen to make contrary findings. In short, petitioner proffers only an intellectual abstraction, and in effect is asking this Court to re-try the case on the facts.

7. Any burden on any insurance carrier flowing from the factual adjudications below, is easily resolvable by draftsmanship. In such a setting, it is incredible for petitioner to ask this Court to engage in an intellectual discourse placing undefined and uncertain fetters upon *Erie R. R. Co.* v. *Tompkins*. The record is so woefully deficient in supporting petitioner's tendered question that petitioner itself is incapable of indicating except with vague generalities precisely what the court below should have done. A clearer illustration of a spurious question so unfocused as to make informed resolution of it virtually impossible, can scarcely be visualized.

Questions Presented on This Petition

In the light of the actual record, the true questions are:

1. Where an insurance policy in its key section, the section determining the amount recoverable thereunder, provides a unifying definitional directive that "all property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence", and where the courts below have found as a fact that the policy was designed to provide coverage on a risk central to respondent's business, namely the hazard of a delamination or similar catastrophe involving a common defect with respect to a huge number of completed products utilizing defective panels acquired from one source, does the Supreme Court sit to re-try the case on the facts so as to determine factually whether there is any basis for frustrating the reasonable expectation and purpose of respondent in entering into, relying upon and paying premiums for the specialized business policy insurance coverage which it had purchased?

2. Does the Supreme Court sit to review fictitious, shadowy, abstract, unfocused and even internally contradictory hypothetical questions, never even raised or passed on below, and lacking the perimeters of a proper or adequate record for review?

3. Does the Supreme Court sit to speculate on a spurious constitutional issue, raised for the first time in the petition, couched in meaningless and open-ended generalities, and which is wholly academic since the problem invented by the petition is clearly remediable by careful and intelligent draftsmanship in fashioning petitioner's standard insurance contracts of adhesion?

Counter-Statement

This case was determined below upon a commonsense appraisal of the concrete economic and factual setting supplying the framework of the "business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes" (Opinion, Petition's Appendix A, p. 6a). Petitioner's attempt, at trial and on appeal, to convert the Comprehensive and Umbrella Excess insurance coverage into an empty charade, collapsed in the face of the findings of fact which controlled the issue of liability. Concisely:

In 1969 and 1970, Champion International Corporation ("Champion") was engaged in the business of purchasing vinyl-covered panels from Continental Vinyl, a California company, and supplying those panels to manufacturers of houseboats, house trailers, motor homes and campers, who used those panels to manufacture their products. Champion purchased from this one source, Continental Vinyl, supplies of vinyl-covered panels sufficient to meet estimated production requirements of Champion's customers as previously communicated to Champion. Shipments of the Continental Vinyl panels were made by Champion to each customer as required by the customer (JA 159, 343, 380, 399-401, 420-1, 437, 584-5; also Petition's Appendix A, p. 2a and Appendix D, p. 19a).

The Continental Vinyl panels sold by Champion to its customers, the manufacturers of the vehicles, had a common latent defect. After the vehicles had been completed, many of the Continental Vinyl panels installed in the products began to delaminate; that is, the vinyl film covering the panels peeled away from the underlying substrate to which the vinyl film had been attached, thereby causing property damage to the completed products by reason of the delamination. The bulk of the installation of the defective panels in completed products occurred in 1969, with

a spillover into 1970 (JA 159, 343-4, 354-7, 364-8, 378-9, 381, 385, 397-400, 404-5, 420, 436-7, 439-40, 584-5; also Petition's Appendix A, p. 3a and Appendix D, p. 19a).

Complaints of delamination from the manufacturers and their customers poured in during 1969 and 1970, when it was discovered that the Continental Vinyl panels had peeled away in the interiors of huge numbers of completed vehicles (JA 159; see also, e.g., JA 308, 312-3, 355-7, 385, 397, 404-7; Petition's Appendix A, p. 3a and Appendix D, p. 20a).

Champion employed Liberty Mutual Insurance Company ("Liberty Mutual") to investigate and settle the claims on a fee basis. Champion paid Liberty Mutual in excess of $1.5 million for the property damage settlements which Liberty had effected. Petitioner conceded the reasonableness of those settlements, and conceded coverage (Petition's Appendix D, pp. 22a-23a).

Champion had purchased extremely broad product liability insurance coverage which fit the delamination catastrophe like a glove. First, respondent had a Comprehensive General Liability policy, written by Liberty Mutual, which covered products' hazards and was in the amount of $100,000 for each "occurrence" ($200,000 aggregate) and subject to a $5,000 deductible "per occurrence"[3] for prop-

[3] The $5,000 deductible was contained in an endorsement, Endorsement No. 8 (JA 510-11). The printed form of Endorsement No. 8 provided for a designation as to whether the deductible amount was to apply per claim or per occurrence. Per occurrence was chosen. We reproduce the pertinent text of Endorsement No. 8:

"SCHEDULE

Coverage	Amount and Basis of Deductible
Bodily Injury Liability	$ per claim
	$ per occurrence
Property Damage Liability	$ per claim
	$5,000 per occurrence"

Furthermore, Endorsement No. 8, in defining a "per occurrence basis", limited the application of the deductible to "all" [and not

erty damage liability (Petition's Appendix A, p. 3a). The second policy, petitioner's Umbrella Excess policy, picked up the excess over the $100,000 limit of liability in the Liberty Mutual policy. Petitioner's policy indemnified respondent to a limit of $1 million for any occurrence in excess of the amount recoverable from Liberty Mutual (Petition's Appendix A, p. 3a).

The terms of the Liberty Mutual policy were made controlling over the Umbrella Excess policy (Petition's Appendix A, pp. 6a-7a).

The Liberty Mutual policy contained the following clear and emphatic unifying definitional directive:

> "For the purpose of determining the limit of the company's liability • • • all • • • property damage arising out of continuous or repeated exposure to substantially the same general conditions • • • shall be considered as arising out of one occurrence." (Section IV, Limits of Liability; Non-Cumulative of Liability —Same Occurrence, Liberty Mutual Endorsement No. 1) (JA 498-9).[4]

At the trial on liability, despite Liberty Mutual's payment of the full underlying coverage, and despite Champion's loss of more than $1.6 million, petitioner contended that the insurance coverage for the delamination catastrophe was illusory, i.e., that Liberty Mutual should not have

each incident of] damages, because of "all property damages as the result of any one occurrence" (JA 510). This definition further refuted petitioner's postulate, echoed in its petition, that the deductible amount should be applied to each incident of property damage, unit by unit, and thereby scrap the unifying definition (quoted at p. 11 *infra*), cancel out Liberty Mutual's Comprehensive coverage, and make petitioner's Umbrella Excess policy completely pointless and illusory.

[4] Continental acknowledged that this unifying definitional directive is "the basic provision" controlling the construction of the Liberty Mutual policy (JA 117-8).

paid anything to Champion, and that petitioner can wriggle out of its undertaking in its Umbrella Excess policy. Petitioner pinned its entire defense to the *sole* and *exclusive* thesis that despite the unifying definition, the damage to each of the manufactured vehicles which utilized defective Continental Vinyl panels was a separate occurrence (Petition's Appendix E, p. 26a). Petitioner in effect urged the trial court, in appraising the evidence, to rewrite the Liberty Mutual policy by now substituting a per claim basis (for that is what petitioner's argument inexorably connoted) for the actual per occurrence basis and, to boot, to seek to define the non-existent per claim basis in terms of treating each damaged completed product as a separate claim. The trial judge, on the record before him, refused to undercut respondent's business purpose and objective in obtaining its package of product liability insurance.[5] The trial judge concluded that respondent's insurance coverage could not be eviscerated by applying the $5,000 deductible separately with respect to every damaged manufactured product, unit by unit (Petition's Appendix D, p. 23a and Appendix E, p. 26a).

The petition suppresses at least five cardinal features of the actual record:

1. At trial, petitioner's counsel, through perceptive questioning by the trial judge, acknowledged, against the backdrop of the record, and confronted with the unifying definition, that petitioner would not be urging its bizarre misreading and misapplication of the standard insurance provisions except for the presence of the $5,000 deductible endorsement.[6] This concession shattered petitioner's trial

[5] In respondent's usual and ordinary plywood operations, in selling panels to manufacturers, the foreseeable damage to a single completed manufactured product almost inevitably would be below $5,000, but the total property damages flowing from a single occurrence could be gigantic, as it was in this case.

[6] (JA 129). Petitioner's counsel also conceded that under the controlling New York law petitioner has the burden of establish-

posture since it revealed that the standard clauses of the policy unmistakably had a plain meaning bringing within the orbit of coverage the delamination catastrophe. That plain meaning carried over in construing the deductible endorsement.[7]

2. In October 1966 the standard provisions of a product liability policy were dramatically revised, and the "occurrence" basis of coverage replaced the "accident" basis. The policies involved in our case were the new standard text. The authoritative works on insurance law, presented at the trial, confirmed the correctness of the trial judge's findings that the facts in our case were squarely within the insurance coverage.[8]

ing "that the reading of the policy, in the manner in which Mr. Shainswit [Champion's counsel] has read it, is an unreasonable construction" (JA 143). At trial, and on appeal, Continental's position on liability collapsed because it could not carry that burden, and manifestly so. Indeed, even without the unifying definition which tied together so explicitly other all-encompassing provisions in the policy, the evidence was overwhelming that all of the property damage from the delamination of the Continental Vinyl panels is to be considered as arising from one occurrence. For example, "occurrence" was defined as meaning "an accident, including injurious exposure to conditions • • •" (JA 493), thereby connoting that the "injurious exposure" could take place over an extended period of time—instead of all at once. Further, the trial judge found the policy also contained a provision relating to a single occurrence which results in property damage sustained by one or more persons or organizations (Petition's Appendix D, p. 21a). And when to all these other provisions is added the policy's rejection of a per claim deductibility standard, petitioner's trial position was reduced to futile, esoteric, semantic exercises in seeking to find a non-existent erasure of coverage.

[7] Even District Judge Newman, in dissent, recognized that the unifying definitional directive "provides the meaning for construing the deductible clause" (Petition's Appendix A, p. 9a).

[8] For example, the Practicing Law Institute ("PLI") publication entitled "Products Liability: Law—Practice—Science" (1967), embodied the expert analysis of Edward C. German, the President, Federation of Insurance Counsel:

> "[T]he 'batch clause' • • • has been eliminated from the new policy. Reliance will now be placed on the aggregate limit

3. At trial, petitioner's counsel also conceded that petitioner had the unfettered power to avoid any adverse precedential impact by simple recourse to proper draftsmanship changing the policy text. The trial judge pointed out the type of language that petitioner could and should have employed if it wanted to eliminate the coverage that respondent Champion had in fact purchased under the existing policy (JA 141). To quote the trial judge: "You [petitioner] had within your power to specifically exclude this particular type of risk, but you elected not to do it." (JA 141). Petitioner's trial gambit was that it could unilaterally rewrite the policy and add an absent limit of coverage by doing a juggling act with the definition of an occurrence, the unifying definitional directive, and the deductibility format. Petitioner itself urged the court to supply a plain meaning of the policy. The trial judge rejected

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in the declarations and *on the last paragraph of the Limits of Liability section* which reads as follows:

> For the purpose of determining the limit of the company's liability, all bodily injury and property damage arising out of the continuous or repeated exposure to substantially the same conditions shall be considered as arising out of one occurrence.

"This language is intended to cover the situation where a tuna canner places a batch of canned tuna on the market which turns out to be injurious to a large number of people, resulting in numerous personal injury suits. Under the new policy this would constitute *one occurrence* and the limits previously placed on each accident would apply." (Emphasis added).

Howard C. Sorensen, at page 7:26 in the aforesaid PLI publication has stressed that the new unifying definition applies to "multiple injury and damage from *common or similar conditions*" (Emphasis added).

Similarly, Nachman: "The New Policy Provisions for General Liability Insurance", which appeared in the Fall 1965 issue of the Society of Chartered Property and Casualty Underwriters, states (p. 199) that the occurrence basis applies with respect to "situations involving a related series of events attributable to the same factor: In this kind of situation, only one accident or occurrence is intended for application of policy limits."

petitioner's verbal legerdemain, and applied to the facts the dispositive precedents.[9]

4. The petition is guilty of a massive distortion in stating, as its threshold predicate, that the trial judge applied New York law "differently from the way the New York Court of Appeals previously had applied it" (Petition, p. 3). Nothing could be further from the truth. In *Stauffer Chem. Co.* v. *Insurance Co. of North America*, 372 F.Supp. 1303, 1308 (S.D.N.Y. 1973) (Gagliardi, J.),[10] Stauffer Chemical Co. was represented by Hart & Hume, Esqs., petitioner's trial and appellate counsel. In their brief to Judge Gagliardi, petitioner's counsel urged the very principle of New York insurance law which the trial judge in our case invoked:

> "In order for an insurer to prevail in its contention that a particular hazard is excluded, the insurer must establish that the words and expressions used are reasonably susceptible of *only*[11] one construction, namely that favorable to the insurer. *Sincoff* v. *Liberty Mutual Fire Insurance Company*, 11 N.Y.2d 386, 390 (1962). [Additional Citations.] If the insured can offer a reasonable interpretation, it must be accepted. *Datatab, Inc.* v. *St. Paul Fire and Marine Insurance Com-*

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[9] *Sincoff* v. *Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962), and *National Screen Serv. Corp.* v. *United States Fid. & Guar. Co.*, 364 F.2d 275 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966) (Petition's Appendix D, pp. 23a-24a).

[10] This case, analagous to our case, was invoked by the Second Circuit below (Petition's Appendix A, p. 6a). The petition bypasses this authority. There, in dealing with property damage arising from an ineffective product manufactured by one source causing injury to the crops of dozens of customers in their disparate business locations, the Court described the situation as plainly within the coverage of a policy subsuming under a single occurrence the continuous or repeated exposure to the conditions presented in the *Stauffer Chem.* record (372 F.Supp. at 1305).

[11] The word "only" is underscored in the *Stauffer Chem.* brief.

pany, 374 F.Supp. 36, 38 (S.D.N.Y. 1972)." (Plaintiff's Memorandum on the issue of liability, p. 29).

5. The trial judge focused upon petitioner's admissions that the damage to the vehicles which resulted from the defective panels constituted property damage covered by the Liberty Mutual and Continental policies (Petition's Appendix D, pp. 22a-23a). Given the economic and factual setting in which these policies were written, it was inescapably clear that it was "the reasonable expectation" to have the coverage fulfill the "business purpose" of achieving "substantial economic protection" from the hazard of a delamination or similar catastrophe. *Lipton, Inc.* v. *Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 314 N.E.2d 37, 357 N.Y.S.2d 705, 708 (1974); *Tonkin* v. *California Ins. Co. of San Francisco, Inc.*, 294 N.Y. 326, 329, 62 N.E.2d 215 (1945); *Sincoff* v. *Liberty Mut. Ins. Co.*, 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962).[12]

On appeal, Judge Moore's opinion firmly indicated that petitioner's strained construction that there were 1,400 separate occurrences is at war with any "common-sense appraisal of the overall situation". *Ore & Chem. Corp.* v. *Eagle Star Ins. Co.*, 489 F.2d 455, 457 (2d Cir. 1973).[13] Applying the Liberty Mutual policy provisions to our record (Judge Moore's Opinion, Petition's Appendix A, pp. 2a-8a):

[12] We refer also to *Rickerson* v. *Hartford Fire Ins. Co.*, 149 N.Y. 307, 313, 43 N.E. 856 (1896), where the Court of Appeals stressed that *in all insurance cases*, no rule is more "imperative or controlling" than the mandate: "When the words are, without violence, susceptible of two interpretations, that which will sustain [the insured's] claim and cover the loss must, in preference, be adopted."

[13] As attested by the citations in *Ore & Chem. Corp.*, 489 F.2d at 457, New York's decisional law has emphasized that in applying an insurance policy to a set of facts, the outcome "should be determined not by precise semantic shadings of terms of art, but by common-sense appraisal of the overall situation".

(a) the "*injurious exposure*" resulting in property damage has been the installation of defective vinyl-laminated plywood panels in completed products manufactured by others;

(b) the "*conditions*" to which the property suffering damage has been exposed are the *defective panels manufactured by Continental Vinyl which inexorably delaminated following installation;* and

(c) all diminution in value (*property damage*) resulting from the continuous or repeated installation by manufacturers in a completed product (*exposure*) of defective panels manufactured by Continental Vinyl which inexorably delaminated (*substantially the same general conditions*) constitutes property damage arising out of one occurrence within the meaning of the Liberty Mutual policy.[14]

In the instant petition, Continental is seeking to prolong its seven-year failure to fulfill its clear insurance obligations to respondent. The petition is unworthy.

[14] Even without a unifying definitional directive, the New York Court of Appeals has ruled that the term "occurrence" in a comprehensive policy is sufficiently broad so as to encompass all of the claims of property damage arising out of a common defect in the manufacture by the insured of ski straps which had been sold to the insured's customers for incorporation in ski bindings ultimately sold by the ski retailers. *Sturges Mfg. Co.* v. *Utica Mut. Ins. Co.*, 37 N.Y.2d 69, 332 N.E.2d 319, 371 N.Y.S.2d 444 (1975).

ARGUMENT

1. Petitioner's "Question 1" is non-existent. The Court of Appeals based its decision on a proper and correct *factual* analysis of the "business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes" (Petition's Appendix A, p. 6a), and in full accord with New York law.

Petitioner lost below because of the *facts*, which demolished its bizarre thesis that the Comprehensive General Liability policy, and the Umbrella Excess policy, by some alchemy, did not provide coverage for the delamination catastrophe. *In the setting of the record*, the Court of Appeals concluded that the property damage here involved patently resulted from "a continuous or *repeated exposure* to *substantially* the *same general conditions*", and therefore arose out of *one* occurrence, within the meaning and effect of the policy's unifying definitional directive.

It is axiomatic that this honorable Court does not grant certiorari to review evidence and to discuss specific facts. The Supreme Court will not re-try this case on the facts merely to give a defeated party in the Court of Appeals another hearing to determine factually whether there is any basis for frustrating the reasonable expectation and purpose of respondent in entering into, relying upon and paying premiums for the specialized Comprehensive General Liability and Umbrella Excess policies. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923); *NLRB* v. *Pittsburg Steamship Co.*, 340 U.S. 498, 502, 503 (1951); *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 524, 559 (1957) (dissenting opinions by Mr. Justice Frankfurter and Mr. Justice Harlan); *McAllister* v. *United States*, 348 U.S. 19, 23 (1954) (separate opinion by Mr. Justice Frankfurter in favor of dismissal of writ as improvidently granted: "If there is any class of cases which plainly falls outside the professed considerations by which this Court exercises its discretionary jurisdiction, it is cases involving only interpretation of facts bearing on the issue of causation or negligence.").

As we have noted, the petition grossly distorts Judge Moore's opinion below. Far from refusing to apply New York law, Judge Moore expressly observed that "New York law governs the controversy" (Petition's Appendix A, p. 7a). Indeed, in focusing upon the business purposes promoted by the Comprehensive General Liability and Umbrella Excess policies, as established on this record, namely to secure coverage on a risk central to respondent's business, the Second Circuit interpreted the insurance policies, in their factual setting, in complete conformity with the New York law of contracts. The Second Circuit echoed New York law in construing the policies, and upholding petitioner's liability, in light of the surrounding business purposes coupled with the plain meaning of the words adopted to give the policies a sensible purpose in their economic setting. *Becker* v. *Frasse & Co.*, 255 N.Y. 10, 14, 15, 173 N.E. 905 (1930) (Cardozo, C.J.); *Atwater & Co.* v. *Panama R.R.*, 246 N.Y. 519, 524, 159 N.E. 418 (1927); *Hotel Credit Card Corp.* v. *American Express Co.*, 13 App. Div. 2d 189, 214 N.Y.S.2d 921 (1st Dep't 1961) (Breitel, J.); *Reliable Press, Inc.* v. *Bristol Carpet Cleaning Co.*, 261 App. Div. 256, 25 N.Y.S.2d 70 (1st Dep't 1941).

The New York courts will first ascertain the business purpose of the contract and then, where the parties have chosen words which leave room for construction, choose such construction which will carry out the business purpose. *Empire Properties Corp.* v. *Manufacturers Trust Co.*, 288 N.Y. 242, 248-9, 43 N.E.2d 25 (1942) (Lehman, C.J.); *Aron* v. *Gillman*, 309 N.Y. 157, 163, 128 N.E.2d 284, 288

(1955). Specifically, with respect to product liability insurance policies, it is bedrock law in New York that the obvious intent of an insured, given the economic and factual setting in which such policies are written, to secure substantial economic protection from exposure to claims of third parties in consequence of defects in products, controls adjudication of liability where the insurer, like Continental here, is seeking to wriggle out of its undertaking. *Lipton, Inc.* v. *Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 314 N.E.2d 37, 357 N.Y.S.2d 705, 708 (1974). Where, as factually established, it was the reasonable expectation of respondent to have the Comprehensive and Umbrella Excess policies fulfill the business purpose of protecting against the hazard of a delamination catastrophe, no niggardly construction, founded upon semantic legerdemain, will be tolerated to defeat the meaning, purpose and object of the insurance coverage. *Sincoff* v. *Liberty Mut. Ins. Co.*, 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962);[15] *Tonkin* v. *California Ins. Co.*, 294 N.Y. 326, 329, 62 N.E.2d 215 (1945); *National Screen Serv. Corp.* v. *United States Fid. & Guar. Co.*, 364 F.2d 275 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966).

New York also applies, with special vigor to a policy by its own terms denominated a "Comprehensive General Liability policy", a cardinal rule of construction that any ambiguity would be resolved against the insurer; the burden which the insurer must carry is to show, clearly and conclusively, that the construction it urges is the *only* one that fairly could be placed on the policy. *Sincoff, supra; Tonkin, supra; Bronx Sav. Bank* v. *Weigandt*, 1 N.Y.2d 545, 551-2, 136 N.E.2d 848, 154 N.Y.S.2d 878 (1956); *Hartol Prod. Corp.* v. *Prudential Ins. Co.*, 290 N.Y. 44, 49-50, 47

[15] In *Pan American World Air, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1000 (2d Cir. 1974), the Court of Appeals unanimously emphasized: "*Sincoff* states the well-established New York rule for all types of insurance."

N.E.2d 687 (1943).[16] The Second Circuit, below, found it unnecessary to further bolster its decision by invoking the firm concept of New York insurance law dealing with resolution of ambiguity since the factual circumstances of the manifest business purposes, and the plain meaning of the policy language, already rebuffed, conclusively, petitioner's self-serving semantic shadings and evisceration of the insurance coverage that was within the reasonable expectation and purpose of respondent (Petition's Appendix A, p. 7a). The petition rewrites Judge Moore's opinion and simulates that by emphasizing that it was unnecessary to rely on the New York rule of ambiguity, Judge Moore, and the Second Circuit as a whole, were somehow defying the *Erie* doctrine, notwithstanding that the Second Circuit had decided the appeal in precise accord with the New York decisional law as above indicated. The petition's Question 1 is unmistakably spurious.

[16] The two New York citations on which petitioner hinges Question 1, are woefully wide of the mark. They do not impinge in the slightest on our exposition of the New York law. *Johnson Corp.* v. *Indemnity Ins. Co.*, 7 N.Y.2d 222, 164 N.E.2d 704, 196 N.Y.S.2d 678 (1959)—cited in petition at pp. 11-12—has nothing to do with products hazard liability coverage. Further, the opinion provides no comfort for Continental. In connection with subway construction, the issue presented was whether there was one accident or two accidents within the coverage of a liability policy providing for "$50,000 each accident." *The policy said nothing more than that.* Needless to say, the policy totally lacked the definition of our Liberty Mutual policy that all property damage arising out of continuous or repeated exposure to substantially the same general conditions, shall be considered as arising out of one occurrence. In finding that there were two separate accidents, thereby *increasing* the carrier's liability, the Court stressed that the insured was entitled to *fuller* indemnification because of the "reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (7 N.Y.2d at 227).

In *Hartford Acc. & Ind. Co.* v. *Wesolowski*, 33 N.Y.2d 169, 173, 305 N.E.2d 907, 350 N.Y.S.2d 895, 899, (1973) (Petition, *ibid.*), the Court simply ruled that in "the perspective and expectation of the ordinary purchaser" of an automobile liability policy a "three-car accident" was a single accident.

2. Petitioner's "Question 2" is spurious. There is absolutely no conflict in the circuits. There is no burden on interstate commerce simply because petitioner lost on the facts. Petitioner's litany of fears is resolved by simple draftsmanship.

Petitioner's Question 2 is, without further characterization, absolutely bizarre. It is punctuated with misconception after misconception:

(a) Petitioner's entire question is fictitious. The decision by the Second Circuit was based on the facts, and in full accord with New York law.

(b) Application of *Erie* per force envisages differences in adjudications among different circuits applying different concepts of state law. *Ruhlin* v. *New York L. Ins. Co.*, 304 U.S. 202 (1938)—quoted at page 6 hereinabove—establishes that a suggested conflict among the circuits is in truth non-existent where the "conflict may be merely corollary to a permissible difference of opinion in the state courts".

(c) Petitioner interlards in its discussion a false argument that the term "accident" is synonymous with "occurrence" (Petition, p. 13). As we have seen, our policies reflect the dramatic revision in October 1966 whereby the insurance industry substituted an "occurrence" basis of coverage for the "accident" basis (pp. 13-14 hereinabove). *Elston-Richards Storage Co.* v. *Indemnity Ins. Co.*, 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 251 F.2d 627 (6th Cir. 1961)—cited in petition at page 13—is absolutely irrelevant. There, a warehouseman liability policy was totally silent, lacking even a shred of definition as to what was contemplated by the parties as constituting "one event or occurrence". Here, we have a wealth of policy provisions, capped by the unifying definition, tying together as arising out of one occurrence, all the property damage flowing from the delamination of the Continental Vinyl panels.

The unifying definition, which emerged in the 1966 revision, per force overruled in any event any invocation of *Elston-Richards*, decided six years earlier. This was pointed out by the trial judge at our trial (JA 136). Further, *Elston-Richards*, 194 F. Supp. at 679, reveals that if the court in Michigan had had before it the products liability policy containing the Liberty Mutual provisions, and especially the unifying definition, to implement the business purpose of the policy, the court unmistakably would have been constrained to construe the policy just as the Court of Appeals in our case construed it. And if more need be said, the decision below is fortified by the New York decisional law that we have presented. Under the New York law, it is unquestionable that petitioner's rewriting of the Liberty Mutual policy so as to equate each incident of damage to a vehicle as a separate occurrence, and thereby frustrate respondent from receiving even one cent of indemnification for its stupendous loss, runs afoul of the New York law. In *National Screen Serv. Corp.* v. *United States Fid. & Guar. Co.*, 364 F.2d 275 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966), *supra*, the Second Circuit had ruled that the firm concepts of New York insurance law were so strong that the Court was constrained to rule in favor of the insured, despite the fact that the Ninth Circuit, on a set of facts virtually identical to those in *National Screen*, decided in favor of the insurer (364 F.2d at 280). Certiorari was denied by this Court, where the respondent had predicated its opposition to the writ on the settled teaching of *Ruhlin*.

(d) Capping everything, it is silly for petitioner to invent the non-existent burden on interstate commerce simply because it lost on the facts. In the words of Mr. Justice Holmes, speaking for the unanimous Court, in *Queens Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 492 (1924), "the parties can shape their contract as they like." Consequently, petitioner's non-existent fears are in any event resolved by simple draftsmanship, as the trial judge

explicitly underscored at trial (JA 141) and in his opinion (Petition's Appendix C, p. 24a).

All in all, petitioner's question 2 is a counterfeit question, resting upon a false premise, and completely at war with the concrete realities of the true record.

3. Petitioner's "Question 3" is chimerical. It is squarely contradictory of petitioner's "Question 1" and tenders only cloudy and meaningless abstractions which violate every tenet of certiorari. Capping everything, this shadowy question was never even raised or passed on below, and lacks the perimeters of a proper or adequate record for review.

The third question contrived by petitioner is an amalgam of confusion, contradiction and abstraction culminating in a void of unfocused speculation without even a shred of support in the record. We have already pointed out (pp. 5-7 hereinabove) that petitioner's evanescent final stab at certiorari encounters at least seven independently decisive roadblocks:

(a) The third question is squarely at odds with the petition's first question. The petition has no faith in the first question because that question, as we have seen, is so transparently spurious. Accordingly, on the heels of the non-existent thesis that the Court of Appeals failed to follow New York state law, the petitioner now postulates that the Court of Appeals should have refused to follow New York state law. The petition is simply indulging in one unworthy artifice after another, heedless of internal inconsistency. That inconsistency dramatizes the sleight of hand, semantic confusion which is the hallmark of the petition as a whole.

Indeed, it is preposterous for petitioner to fabricate, solely for purposes of certiorari, a counterfeit question that the Second Circuit should have refused to decide the

case under New York law, in the face of petitioner's own urgings in the Second Circuit that New York law governs the controversy (Petition's Appendix A, p. 7a).

(b) The petition's invitation that the Court should "expound" (Petition, p. 17) upon a repeal of the *Erie* doctrine, in the total absence of any kind of factual record that could serve as a framework for an academic consideration of such a drastic reversal of such a basic constitutional doctrine, and where no such fanciful repeal was even intimated below, collides with the ground rules for a writ of certiorari. "What has been alleged is entirely too amorphous to permit adjudication of the constitutional issues asserted. • • • This Court has often refused to decide constitutional questions on an inadequate record." *Ellis* v. *Dixon*, 349 U.S. 458, 462, 466 (1955); *Needelman* v. *United States*, 362 U.S. 600 (1960); *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960).

Furthermore, it has long been the considered practice of this honorable Court not to decide abstract, hypothetical or contingent questions, especially so where this Court is unabashedly requested to engage in an intellectual discourse placing undefined and uncertain fetters upon no less a doctrine than that of *Erie* v. *Tompkins*. *Alabama State Fed'n of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945); *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568, 584 (1947); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

The foregoing authorities apply *a fortiori* where the petition's unfocused attack upon the *Erie* doctrine was never even raised or passed on below. *De Backer* v. *Brainard*, 396 U.S. 28 (1969).

(c) *Ruhlin* v. *New York L. Ins. Co.*, 304 U.S. 202 (1938), as we have noted, was decided just seven days after *Erie*. *Ruhlin* makes it indisputably clear that the *Erie* requirement that the federal courts look to the particular state law which may control adjudication, poses no "duties dif-

ficult or strange" (304 U.S. at 209). *Ruhlin*, without more, disposes of petitioner's Question 3.

(d) Petitioner itself admitted that the New York law, which demolishes petitioner's bizarre misconstruction of the policy provisions, is not in conflict with the holdings of any other jurisdiction. Thus, Question 3 is postulated on the existence of a conflict which petitioner, when it had no motive for obfuscation, completely disavowed below (p. 6 hereinabove).

(e) Petitioner's tendered question, to the extent that it is susceptible of a coherent thesis, asks in effect that this Court review the Second Circuit's factual analysis. As already noted, certiorari is inappropriate for such a purpose.

(f) The third question makes no effort to explain how the phantom "burden on interstate commerce" can be eliminated, or even to define the nature of the burden in terms other than registering unhappiness that petitioner lost on the facts (p. 7 hereinabove).

(g) Finally, petitioner cannot extinguish the dispositive point that any burden on any insurance carrier flowing from the factual adjudications below, is easily resolvable by draftsmanship. Petitioner is grasping at straws in urging that this Court should engage in an intellectual discourse placing undefined limitations upon *Erie*, solely to resolve a problem of draftsmanship, "when the party drafting such a form contract has not included a provision it easily might have." *S.S. Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). *See also, Queens Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 492 (1924).

Petitioner's Question 3 is thus riddled with one deficiency after another precluding certiorari.

CONCLUSION

The petition is singularly devoid of merit and should be denied.

Dated: New York, New York
June 24, 1977

Respectfully submitted,

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